

Boo Are Ngor (claiming as lawful trustee of Kim Leng Tze Temple) v Pentadbir Tanah Daerah Muar & Anor A

HIGH COURT (MUAR) — ORIGINATING SUMMONS NO 24(L)–696 OF 2007 B
AHMADI ASNAWI JC
10 MAY 2009

Civil Procedure — Pleadings — Function of pleadings — Affidavit in reply — Whether failed out of time — Whether failed to apply for leave to file out of time — Whether 14 day requirement to file affidavit in reply mandatory — Rules of the High Court 1980 O 28 r 3(4) C

Civil Procedure — Pleadings — Importance of pleadings — Affidavit in reply — Whether contain proper title — Whether breach of O 41 r 1 of the Rules of the High Court 1980 — Whether word ‘must’ used in Order equated with word ‘shall’ to suggest mandatory requirement — Rules of the High Court 1980 O 41 r 1 D
E

Land Law — Acquisition of land — Compensation — Land held by plaintiff as trustee — Whether compensation sum was wrongly paid — Land Acquisition Act 1960 ss 2 & 29(1) F

On 5 August 1993, the plaintiff was appointed as trustee for the Rumah Berhala Kim Leng Tze (‘Rumah Berhala’), an association established under the Societies Act 1966, to hold a half share in a piece of land known as Lot 4196 in Bandar Muar (‘the land’) on trust for the Rumah Berhala. The document creating the trust was endorsed and registered in the memorial of registration on 15 August 1993. As a trustee the plaintiff enjoyed the same rights and interest of a registered owner over the half share in the land. When the land was acquired by the government, an inquiry was held to determine the amount of compensation payable to the Rumah Berhala for the acquired land. At the inquiry, which was attended by one Chua Mee Liang on behalf of the Rumah Berhala, it was decided that the compensation payable to the Rumah Berhala was to be RM35,780.50 (‘the compensation sum’) and there was no objection made against this decision. Thereafter pursuant to a court order dated 9 April 2003 the land administrator of Muar (‘the first defendant’), deposited the compensation sum in court. The Rumah Berhala thereafter wrote to the land administrator for the release of the compensation G
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A sum. On 14 July 2004, the first defendant obtained an order from the court (‘the order of court’) for the removal of the compensation sum deposited in court and for its payment to the Rumah Berhala. It was the plaintiff’s contention that the order of court was wrongly and irregularly obtained and therefore the compensation sum was wrongly paid by the first defendant to the second defendant vide the wrongly obtained order of court. Thus the plaintiff applied by way of the originating summons application to set aside the order of court obtained by the first defendant. The plaintiff also sought an order for the first and second defendants to be jointly and severally liable to return the compensation sum to the plaintiff as the sole trustee of the land. In addition the plaintiff also sought certain declaratory reliefs. The plaintiff submitted that as the sole trustee of the land she was legally entitled to receive the compensation sum and no one else. The originating summons and affidavit in support were served on the first defendant on 20 November 2007 and under O 28 r 3(4) of the Rules of the High Court 1980 (‘RHC’) the first defendant had 14 days from that date to file its reply. However, the first defendant did not apply for leave to file its affidavit in reply out of time thereby protracting the hearing of the instant application. The second defendant, who was served with the summons and affidavit on 4 January 2008, only filed her affidavit in reply on 15 April 2008. In her affidavit in reply the second defendant did not make any submissions but adopted the submissions of the first defendant.

F **Held**, allowing the plaintiff’s claim with costs:

- (1) The word ‘must’ that appears in O 28 r 3(4) of the RHC requires the 14 day requirement to be mandatorily complied with or otherwise there would be no end to the old habits of filing affidavits at the last minute prompting the other side to seek adjournments. To make matters worse the first defendant in the instant case had not even applied for leave to file the affidavit out of time. The first defendant was not at liberty to file its affidavit in reply as and when it deemed fit to do so without having regard to the requirements under the RHC. Additionally the first defendant’s affidavit did not contain a proper title in the cause or matter under contention and was therefore in breach of O 41 r 1 of the RHC. Again the word ‘must’ used in this order must necessarily be equated with the word ‘shall’ to suggest a mandatory requirement. For these reasons, the first defendant’s affidavit in reply must be rejected. This in effect meant that the first defendant had no prima facie defence on merits and could not challenge the plaintiff’s averments (see paras 8–11).
- (2) On the evidence, the plaintiff was an ‘interested person’ within the meaning of s 2 of the Land Acquisition Act 1960 (‘the Act’) and was

entitled to be a party to the acquisition proceedings from the beginning to its end. As the registered owner, though upon trust, the plaintiff had priority claim upon the compensation sum over other beneficiaries of the Rumah Berhala. In the circumstances, under s 29 of the Act the compensation sum ought to have been paid to the plaintiff and there was no need for the first defendant to have paid the money into court. The first defendant's own records and the memorial of registration showed the plaintiff to be the registered owner of the half share of the land. Thus the whole exercise adopted by the land administrator under s 29(1)(a), (b) or (c) of the Act in depositing the compensation sum into court and later taking out the same to pay to the second defendant was wholly irregular (see paras 13–14).

[Bahasa Malaysia summary]

Pada 5 Ogos 1993, plaintiff dilantik sebagai pemegang amanah untuk Rumah Berhala Kim Leng Tze ('Rumah Berhala'), sebuah persatuan yang ditubuhkan di bawah Akta Persatuan 1966, untuk memegang separuh daripada bahagian dalam sebidang tanah yang dikenali sebagai Lot 4196 di Bandar Muar ('tanah tersebut') atas amanah bagi pihak Rumah Berhala. Dokumen membentuk amanah itu diindorskan dan didaftarkan dalam memorial pendaftaran pada 15 Ogos 1993. Sebagai pemegang amanah plaintiff menikmati hak-hak dan kepentingan yang sama dengan pemilik berdaftar ke atas separuh daripada bahagian tanah tersebut. Apabila tanah tersebut diperoleh oleh kerajaan, satu siasatan diadakan untuk menentukan jumlah pampasan yang perlu dibayar kepada Rumah Berhala untuk tanah yang diperoleh. Semasa siasatan, yang dihadiri oleh Chua Mee Liang bagi pihak Rumah Berhala, telah diputuskan bahawa pampasan yang perlu dibayar kepada Rumah Berhala adalah berjumlah RM35,780.50 ('jumlah pampasan') dan tiada bantahan dibuat terhadap keputusan ini. Berikutan itu menurut perintah mahkamah bertarikh 9 April 2003 pentadbir tanah Muar ('defendan pertama'), telah mendepositkan jumlah pampasan di mahkamah. Rumah Berhala itu kemudiannya telah menulis kepada pentadbir tanah untuk pelepasan jumlah pampasan itu. Pada 14 Julai 2004, defendan pertama telah memperoleh perintah daripada mahkamah ('perintah mahkamah tersebut') untuk pemindahan jumlah pampasan yang didepositkan di mahkamah dan untuk pembayarannya kepada Rumah Berhala. Plaintiff menghujahkan bahawa perintah mahkamah tersebut telah diperoleh dengan salah dan di luar aturan dan oleh itu jumlah pampasan telah salah dibayar oleh defendan pertama kepada defendan kedua melalui perintah mahkamah tersebut yang diperoleh secara salah. Oleh itu plaintiff memohon melalui permohonan saman pemula untuk mengetepikan perintah mahkamah tersebut yang diperoleh oleh defendan pertama. Plaintiff juga memohon perintah agar defendan-defendan pertama dan kedua bertanggungjawab secara bersama dan berasingan untuk

- A memulangkan jumlah pampasan kepada plaintif sebagai satu-satunya pemegang amanah tanah tersebut. Tambahan plaintif juga memohon relief-relief deklarasi tertentu. Plaintif menghujahkan bahawa sebagai satu-satunya pemegang amanah tanah tersebut dia secara sah berhak menerima jumlah pampasan tersebut dan bukan sesiapa yang lain. Saman
- B pemula dan afidavit sokongan telah disampaikan ke atas defendan pertama pada 20 November 2007 dan di bawah A 28 k 3(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') defendan pertama mempunyai 14 hari dari tarikh tersebut untuk memfailkan jawapannya. Walau bagaimanapun, defendan pertama tidak memohon kebenaran untuk memfailkan afidavit
- C jawapannya di luar masa yang mana akan melanjutkan perbicaraan permohonan ini. Defendan kedua, yang disampaikan saman dan afidavit pada 4 Januari 2008, hanya memfailkan afidavit jawapannya pada 15 April 2008. Dalam afidavit jawapannya defendan kedua tidak membuat sebarang penghujahan tetapi menggunakan hujah-hujah defendan pertama.
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Diputuskan, membenarkan tuntutan plaintif dengan kos:

- E (1) Perkataan 'must' yang terdapat dalam A 28 k 3(4) KMT menghendaki keperluan 14 hari dipatuhi secara mandatori dan jika sebaliknya amalan memfailkan afidavit di saat-saat akhir akan berterusan yang akan menyebabkan pihak satu lagi memohon penangguhan. Lebih
- F memburukkan keadaan dalam kes ini, defendan pertama langsung tidak memohon kebenaran untuk memfailkan afidavit di luar masa. Defendan pertama tidak boleh sewenang-wenangnya memfailkan afidavit jawapannya pada bila-bila masa ia berfikir perlu berbuat sedemikian tanpa menghiraukan keperluan-keperluan di bawah KMT. Tambahan pula afidavit defendan pertama tidak mengandungi tajuk betul kausa atau perkataan yang dihujahkan dan oleh itu telah
- G melanggar A 41 k 1 KMT. Dan juga perkataan 'must' yang digunakan dalam perintah ini mestilah sewajarnya disamakan dengan perkataan 'hendaklah' untuk mencadangkan keperluan mandatori. Oleh sebab alasan-alasan tersebut, afidavit jawapan defendan pertama hendaklah ditolak. Ini sebenarnya bermaksud bahawa defendan pertama secara
- H prima facie tidak mempunyai apa-apa pembelaan atas merit dan tidak boleh mencabar penegasan-penegasan plaintif (lihat perenggan 8–11).
- I (2) Berdasarkan keterangan, plaintif merupakan 'interested person' dalam maksud s 2 Akta Pengambilan Tanah 1960 ('Akta tersebut') dan berhak menjadi pihak kepada prosiding pemerolehan dari mula hingga akhir. Sebagai pemilik berdaftar, meskipun atas amanah, plaintif mempunyai keutamaan tuntutan ke atas jumlah pampasan daripada benefisiari lain Rumah Berhala tersebut. Dalam keadaan ini, di bawah s 29 Akta tersebut jumlah pampasan sepatutnya dibayar kepada plaintif dan

defendan pertama tidak perlu membayar wang itu ke mahkamah. Rekod defendan sendiri dan memorial pendaftaran menunjukkan plaintif sebagai pemilik berdaftar separuh daripada bahagian tanah tersebut. Oleh itu keseluruhan pelaksanaan yang digunakan oleh pentadbir tanah di bawah s 29(1)(a), (b) atau (c) Akta tersebut dalam menandatangani jumlah pampasan ke mahkamah dan kemudian mengeluarkannya untuk membayar defendan kedua secara keseluruhannya adalah di luar aturan (lihat perenggan 13–14).]

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Notes

For a case on importance of pleadings, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 5439.

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For cases on compensation, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1843–1875.

For cases on function of pleadings, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5421–5423.

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Cases referred to

Gan Thing Phing v Ong Gek Kim (No 2) [1998] 7 MLJ 351; [1997] 7 CLJ 146, HC (folld)

Perbadanan Nasional Insurance Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85; [1996] 3 CLJ 321, CA (refd)

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Legislation referred to

Land Acquisition Act 1960 ss 2, 29(1), (1)(a), (b), (c), Forms H, K
Rules of the High Court 1980 O 28 r 3(4), O 32 r 13(2)(b), O 41 r 1
Societies Act 1966

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SE Wong (SE Wong & Co) for the plaintiff.

Shahrizal bin Shaari (Assistant State Legal Adviser, State Legal Advisers Chambers) for the first defendant.

TS Chang (Henry Soong & Chang) for the second defendant.

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Ahmadi Asnawi JC:

[1] The plaintiff claims to be the trustee of 1/2 share of a piece of land known as Lot 4196, EMR 3353 Mukim Bandar Muar (the said land) for Rumah Berhala Kim Leng Tze, Muar ('Rumah Berhala'), an association established under the Societies Act 1966 and to hold the said land for the said Rumah Berhala.

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[2] The following events then took place:

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- (i) The said land was acquired by the government for the purpose of constructing the Muar by-pass vide Warta Kerajaan Negeri Johor dated 22 November 2001.

- A** (ii) An inquiry was held and compensation for the acquired land was determined at RM71,561 as indicated in Borang H. The portion for the Rumah Berhala was RM35,780.50. One Chua Mee Liang attended the inquiry on behalf of the Rumah Berhala. There was no objection as regards to the amount of the compensation paid.
- B** (iii) The land administrator, Muar, then deposited the said compensation sum in court vide Saman Pemula 24(PTD)–193 of 2003. The court order was dated 9 April 2003.
- C** (iv) On 7 June 2004 the said Rumah Berhala wrote to the land administrator to take out the said compensation sum (RM35,780) deposited in court and thereafter release the said sum to the Rumah Berhala.
- D** (v) On 14 July 2004, vide Saman Dalam Kamar (encl 12) of Saman Pemula 24(PTD)–193 of 2003, the land administrator obtained an order for the removal of the said compensation sum deposited in court and for its subsequent payment to the said Rumah Berhala — see exh BAN4 of encl 3, Saman Pemula 24(L)–696 of 2007, the present suit.
- E** (vi) On 21 September 2004 one Chua Mee Liang took the cheque amounting to RM35,780.00 on behalf of the Rumah Berhala from the land administrator's office.
- F** [3] It is this order dated 14 July 2004 enumerated in para (v) above that the plaintiff is now seeking to set aside vide encl 2 of Saman Pemula No 24(L)–696 of 2007. For various reasons as indicated in para 2 of the same enclosure, the plaintiff is also seeking a declaration that the said order was wrongly and irregularly obtained. The plaintiff also claims that the said compensation sum was wrongly paid by the first defendant to the second defendant vide the said wrongly and irregularly obtained order. As such, the plaintiff is now asking that both the first and second defendants be jointly and severally liable to return the said compensation sum to her on the grounds that as the sole trustee of the said land, she is legally entitled to receive the said compensation sum and no one else.
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- [4] In so far as it relates to the cause papers, it is worthy to note the following chronology:
- I** (i) This Saman Pemula (24(L)–696 of 2007) (encl 2) with the affidavit in support (encl 3) was served on first defendant on 20 November 2007.
- (ii) By O 28 r 3(4) of the Rules of the High Court 1980 (RHC), the first defendant has 14 days from 20 November 2007 to file its reply ie on or before 4 December 2007.

[5] These chronology of events were not disputed by the first defendant. It was also not disputed that the first defendant did not apply for leave to file its affidavit in reply out of time. A

(vii) This saman pemula was served upon the second defendant on 4 January 2008. B

(viii) The second defendant was given 14 days from the date of the second hearing date (26 March 2008) to file her affidavit in reply ie on or before 8 April 2008.

(ix) The second defendant did not file her affidavit in reply on or before 8 April 2008. C

(x) With the consent of the plaintiff's solicitors the second defendant was given till 14 April 2008 to file her affidavit in reply.

(xi) The second defendant filed her affidavit in reply on 15 April 2008. Her reply was served upon the plaintiff on the same date. D

[6] Learned counsel for the second defendant makes no submissions. He adopted the submissions made by the learned Penolong Kepada Penasihat Undang-Undang Negeri Johor for the first defendant in full. It appears that he has no dispute over the course of events enumerated above. E

[7] It is very obvious from the narrative above that the first defendant had failed to comply with the requirement of O 28 r 3(4) of the RHC which provides: F

(4) Where the defendant intends to adduce evidence with reference to the originating summons served on him, he must also do so by affidavit and the affidavit must be filed and a copy thereof must be served on the plaintiff not later than 14 days after being served with a copy of the affidavit by the plaintiff under paragraph (2). G

[8] The Court of Appeal in *Perbadanan Nasional Insurance Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85; [1996] 3 CLJ 321 has equated the word 'must' where it appears in O 32 r 13(2)(b) of the RHC with the word 'shall' and '... for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such a discretion'. In my view this ruling equally applies with equal force to interpret the word 'must' in O 28 r 3(4), for the rationale embedded therein is also relevant for the interpretation of the word 'must' herein. The 14 days requirement must be mandatorily complied with, otherwise there will be no end to old habits of filing affidavits at the last minute prompting the other side to seek adjournments. As stated by Her Ladyship therein '... to state otherwise would H I

A *defeat the very purpose O 32 r 13(2) was intended to ie to prevent any last minute affidavit being filed so as to protract the hearing of any proceedings in chambers ...'.*

B [9] What makes it even worse is the fact that first defendant did not even apply for leave to file the said affidavit in reply out of time. It is absolutely not the law to allow the first defendant the liberty to file its affidavit in reply as and when they deem it fit to do so without having regard to the requirements under the RHC 1980.

C [10] Additionally the first defendant's affidavit in reply was not properly entitled. It does not contain a proper title in the cause or matter now under contention. This is clearly a breach of O 41 r 1 of the RHC 1980 (*Gan Thing Phing v Ong Gek Kim (No 2)* [1998] 7 MLJ 351; [1997] 7 CLJ 146, followed). Again, the word used in O 14 r 1 is '*must*' which must necessarily
D be equated with the word '*shall*', thereby suggesting a mandatory requirement.

E [11] For all the reasons given, the first defendant's affidavit in reply must be rejected. With the rejection, the first defendant has no defence on the merits. The first defendant has no reply that prima facie they have a 15 defence on the merits. Consequently, there are no denials or rebuttals of the allegation of facts made by the plaintiff through her affidavit in support of the saman pemula (encl 2). Equally, the first defendant could not challenged the
F averments made by the plaintiff therein.

G [12] Coming to the stratum of the plaintiff's claim, the affidavit evidence indicates that the Rumah Berhala is an association formed and registered under the Societies Act 1966. On 5 August 1993 the plaintiff was appointed as trustee for the Rumah Berhala and to hold the said 1/2 share of the land (Lot 4196, EMR 3353, Mukim Bandar, Daerah Muar) on trust for the Rumah Berhala — see exh 'BAN1' of encl 3. The creation of the said trust over the 1/2 share of the said land and the factum that the plaintiff was holding the said 1/2 share on trust was endorsed and registered in the
H memorial of registration on 15 August 1993 — see Catatan Carian Rasmi Persendirian exhibited in 'BAN1' of encl 3. In such event, for all intents and purposes the plaintiff enjoyed the same rights and interests over the said 1/2 share as that enjoyed by other registered proprietors. She also enjoyed the same status of indefeasibility of title over the said 1/2 share of the land. Even
I the Borang K notice issued by the first defendant showed that the plaintiff was the registered owner, holding the said 1/2 share on trust on behalf of the said Rumah Berhala — see exh 'BAN2', encl 3.

[13] On the evidence, the plaintiff is thus an '*interested person*' within the meaning of s 2 of the Land Acquisition Act 1960 ('the Act'). As an interested person, she is entitled to be informed, be involved and to be a party in the acquisition proceeding of the said land from the beginning to its final end. All the notices, where relevant, ought to be served upon her. Hence by s 29(1) of the Act, the land administrator should serve Borang H upon her and make payment of the compensation sum to her. Being the registered owner, though upon trust, the plaintiff had priority claim upon the said compensation sum over other beneficiaries of the Rumah Berhala. Clearly she is the person entitled over the sum as envisaged by s 29(1) of the Act. The section clearly requires the land administrator to make payment of the compensation sum to the land owner except for those cases falling within the ambit of sub-s (a), (b) or (c) of s 29(1). Here the landowner is obviously the plaintiff though she held the same on trust.

[14] There is no reason for the land administrator to pay the money into court for the need to do so as provided under s 29(1)(a), (b) or (c) of the Act does not exist. The land administrator should not have had any difficulty in serving Borang H and pay the compensation sum to the plaintiff as its own records, Borang K and the memorial of registration, shows that the plaintiff is the registered owner of the said 1/2 share of the land. But Borang H was not even served on the plaintiff, thereby denying the plaintiff from staking its claim. It is thus my view that the whole exercise adopted by the land administrator under s 29(1)(a), (b) or (c), of the Act in depositing the said compensation sum into court and later taking out and subsequently paying the same to the second defendant is wholly irregular. Consequently, it is my view that the compensation sum was wrongly paid by the first defendant to the second defendant.

[15] Premised upon the reasons given above I allowed the plaintiff's claim. The order dated 14 July 2004 is set aside and the first and second defendant are ordered to return, jointly and severally, the said compensation sum to the plaintiff within three months from the date of service of the order hereof. Both the first and second defendants are also ordered to pay the costs of this proceedings severally. The costs are to be taxed if no agreed sum is agreed. In view that the prayer to set aside the order made on 14 July 2004 is allowed, the declaratory reliefs asked for in the second prayer is rendered irrelevant. It is a discretionary relief. I find no compelling reason to grant the reliefs sought.

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A *Plaintiff's claim allowed with costs.*

Reported by Kohila Nesan

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